

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 12 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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SAYAN VIBHAG SAHAKARI KHAND UDYOG MANDLI LTD.

Versus

BHAGVANDAS MOTIBHAI PATEL

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Appearance:

MR SN SHELAT WITH MR DS NANAVATI for Appellant  
MR BS PATEL for Respondent No. 1 to 8  
Respondent No.9 served.

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CORAM : MR.JUSTICE J.N.BHATT

Date of decision: 26/07/96

ORAL JUDGEMENT

Whether the impugned judgment and order dated 8th December 1995 passed below Ex.5 in Special Civil Suit No.355/95 by the learned 4th Joint Civil Judge, (Senior Division), Surat, granting ex parte (ad interim) mandatory order falls within the category of rarest of rare cases warranting interference of this Court

exercising its power under the provisions of Order 43 Rule 1(r) of the Code of Civil Procedure, 1908 (Code) is the central theme of the present appeal.

By virtue of the impugned ex parte (ad interim) mandatory order continuance of contract, which, according to the case of the respondents original plaintiffs is founded upon the principle of promissory estoppel was ordered. As a result of the impugned order against the appellants original defendants, direction is issued to continue the plaintiffs to employ the trucks and tractors for the purpose of transportation of sugarcane of appellant No.1 Co-operative Society. The parties are hereinafter referred to as they are addressed in the plaint for the convenience sake. The plaintiffs who are the members of the Co-operative Society instituted the aforesaid suit for declaration and injunction challenging the resolution of the defendant No.1 Co-operative Society terminating the contract of transportation of sugarcane of the Co-operative Society. The plaintiffs sought declaration that the contract of transportation of sugar cane granted to the plaintiffs in 1978 and renewed in 1982 cannot be rescinded and sought perpetual injunction that the defendant Co-operative Society should be restrained from causing any disturbance or hurdle in execution, implementation and operation of the contract of transport granted by the Co-operative Society in 1978 to its 50 members.

The plaintiffs filed application Ex.5 along with the suit for interim injunction and prayed for ad interim order. The Trial Court granted ex parte injunction on 8.12.95 against the defendants holding that there is a prima facie case for ad interim mandatory injunction. The suit has been filed by 9 members of the Co-operative Society and got the ad interim mandatory injunction for all the 50 members of the defendant Co-operative Society. Of course, the plaintiffs also had submitted an application under Order 1 Rule 8 of the Code. The plaintiffs have also claimed alternative relief for damages to the tune of Rs.1 lac with interest.

Defendant No.1 is a Co-operative Society. In the year 1978, the Society had entrusted the work of transportation in favour of the plaintiffs and enabled them to get loan from the Bank for purchase of truck and tractors. The loan was to be repaid within a period of seven years and during that period, out of the carting bills of the plaintiffs, 60 per cent was to be directly paid to the bank towards the loan amount. By 1986, all the loans came to be repaid. Since the business of the

Society had enhanced, the Society was required to engage more trucks and transporters and that had enabled and assisted the new members for the purpose of loan from the Bank. The plaintiffs, inter alia, contended that the contract was a solemn promise and as such it is a perpetual contract which cannot be rescinded.

Defendant No.1 Cooperative Society by passing a resolution on 21.12.90, granted transportation work for a further period of three years to those members who had purchased the vehicles in 1978-82. The defendant No.1 Co-operative Society, through its Zone Samiti published an advertisement for the allotment of transportation works to its members. The advertisement was published on 19th June, 1994. The plaintiffs felt aggrieved by the same because applications were invited from remaining members of the Society for transportation work excluding the old members including the plaintiffs. With the result, the plaintiffs and 11 other members filed Arbitration Suit No.641/94 before the Registrar's Nominee under the provisions of the Co-operative Societies Act on 21.6.94. Other 30 members of the Society also instituted arbitration suit No.704/94 before the Registrar's Nominee on 25.7.94.

The plaintiffs had prayed for interim injunction before the Registrar's Nominee in the aforesaid arbitration suits. After hearing the parties and considering the merits, the Registrar's Nominee rejected the applications for injunction in Arbitration Case No.641 and 704 of 1994 on 28.11.94. Two revision applications Nos.283 and 285 of 1994 came to be filed by the plaintiffs before the Gujarat Co-operative Tribunal against the orders of the Registrar's Nominee, whereby the applications for interim injunction came to be rejected. The Tribunal also rejected the revision applications and vacated the interim relief granted by it. The Tribunal passed order rejecting the revisions on 8.11.95. The plaintiffs in the suit and the petitioners in the revisions before the Tribunal had also applied for extension of interim relief so as to enable them to pursue with the legal remedy in the High Court by giving application on 18.11.95. Thereafter, instead of pursuing the remedy in the High Court, the plaintiffs filed Review Application No.22 and 23 of 1995 before the Tribunal and obtained interim order which continued upto 18th January, 1996. Before that the plaintiffs filed Special Civil Suit No.355/95 and obtained ad interim injunction on 8.12.95. The original defendants have, therefore, come up before this Court challenging the legality and validity of the ex parte order which is mandatory in nature by filing this Appeal

invoking the aids of the provisions of Order 43 Rule 1 of the Code.

Most of the facts as aforesaid are not in controversy except the nature of contract and its legality. An appeal lies under Order 43 Rule 1 of the Code before this Court against the order of the Civil Judge (S.D.) who has passed the impugned order. Appeals from Orders are provided in Order 43 of the Code. An appeal lies from an order under rule 1 and 2 of Order 39 in view of clause (r) of Order 43 Rule 1. Order 43 Rule 1 (r) reads as under:

"R.1. Appeals from Orders -- An appeal shall lie from the following orders under the provisions of Section 104, namely:-

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(r) an order under Rule 1 or Rule 2 Rule 2A, Rule 4 or Rule 10 of the Order XXXIX;"

It is very clear from the aforesaid provision that an appeal is competent against the order recorded exercising power under Order 39 Rule 1 & 2. Even an ex parte order of injunction is for that purpose an order passed under Rule 1 and 2 of Order 39 of the Code. Therefore, an inescapable conclusion could be drawn that an ex parte order of injunction is an order passed under Rule 1 or 2 of Order 39 and therefore appeal is competent under Order 43 Rule 1 (r). This proposition of law is reinforced by a decision of a Division Bench of this Court rendered in Patel Jasmat Sangaji v. The Gujarat Electricity Board, 1982 GLH 463.

No doubt, although appeal is competent against an ad interim order or an ad interim injunction, the appellate Court ought to exercise such powers with full of circumspection, very cautiously, very sparingly by viewing all the relevant aspects and circumstances. It is true that ordinarily, this Court will be loath to interfere with the ex parte interim order of the Trial Court. Ordinarily, therefore, though technically the appellate court is competent to entertain an appeal against an ex parte order of injunction, would not be inclined to exercise the powers unless exceptional circumstances are borne out. In other words, in the rarest of rare cases, the Court would admit such appeals and still more, in the rarest of rare cases would suspend or quash the ex parte interim orders or injunctions.

It is in the aforesaid legal background while viewed in the light of the factual scenario emerging from the record of the present case, the merits of the present appeal are examined and adjudicated upon. After having examined the factual scenario emerging from the record of the present case and considering the aforesaid proposition of law, in the opinion of this Court, the impugned order recorded by the Trial Court and thereby giving ex parte injunction of mandatory nature imposing continuance of contract though expired and that too in favour of 50 members of the society, whereas, only 9 members filed suit, falls within the category of rarest of rare cases and more so in view of the following circumstances.

Ordinarily, ex parte orders should not be granted unless exceptional circumstances so justified for the interest of justice. Ad interim injunction and that too mandatory in nature and again, in a suit based on contract wherein one of the relief sought for is damages is also unusual and uncommon. The plaintiff has obtained the ad interim injunction whereby continuance of transportation work in favour of 50 persons against the resolution of the Co-operative Society which was passed for giving contract to the remaining members thereof is imposed. In the suit, the plaintiffs have also sought alternative relief of damages for breach of contract. Ordinarily, in a case of breach of contract when damages can be awarded, relief of injunction would not be granted. Section 41 of the Specific Relief Act provides when injunction cannot be granted in view of the provisions of clause (e) and clause (h) of section 41 of the Specific Relief Act. Injunction even after a full fledged trial cannot be granted in a case of breach of contract where efficacious relief by way of damage is available. The effect of the impugned order is imposition of mandatory extension of contractual obligation which had expired, which ordinarily should not be granted and that too without knowing the case and the view of the other side .

Again, it can be noticed that the plaintiffs failed to obtain interim relief from the Registrar's Nominee during the pendency of Arbitration Suits. The Registrar's Nominee after hearing both the sides on merits found no case for interim injunction much less ex parte which came to be confirmed in two revisions by the Gujarat Co-operative Tribunal. The plaintiffs got the extension of interim order from the Tribunal after filing review applications which also came to be dismissed.

However, during the continuance of the interim order

temporarily granted by the Tribunal, during the pendency of the review applications, the plaintiffs filed suit and obtained ex parte order of injunction of mandatory nature and that too in favour of 50 persons whereas 9 plaintiffs claimed the relief.

There is no dispute about the fact that the Registrar's Nominee rejected the applications for interim injunctions on 28.11.94 which came to be confirmed by the Tribunal on 8.11.95. Thereafter, review applications came to be filed and during the pendency of said applications, the suit came to be filed by the plaintiffs in the Trial Court on 8.12.95 and on the same day, the impugned order came to be passed by the learned Trial Court Judge.

It would be seen from the aforesaid dates that the plaintiffs having failed in getting interlocutory orders in their favour in the arbitration suits resorted to civil suit and obtained ex parte injunction. The impugned order does not mention about balance of convenience or irreparable injury. It merely shows that there is *prima facie* case and if no injunction is granted, relief sought by the plaintiffs will be frustrated. It is a settled proposition of law that *prima facie* case is one of the three celebrated principles which must co-exist with other two aspects, viz. balance of convenience and irreparable injury. After examining all the three aspects of both the sides, balance has to be seen. No doubt, detailed meticulous order at the interlocutory stage may not be passed. But it must manifest that such considerations have been taken into account whereby extra ordinary relief of ex parte injunction of mandatory nature necessitated. The impugned order does not reflect application of mind to all the aforesaid three principles required to be examined while passing interim orders much less ex parte interlocutory injunction of mandatory nature.

By virtue of the resolution of the Co-operative Society, the transportation work was entrusted to the plaintiff in 1978. It is true that no specific time limit is prescribed. However, *prima facie* it appears that it cannot be said that the contract was perpetual more so in the light of the fact that defendant No.1 Co-operative Society had passed resolution in 1982 extending the period by three years which again came to be extended in 1990. Thereafter, inviting application from remaining members of the Co-operative Society for the purpose of entrusting the transportation work, prompted the plaintiffs firstly to rush to proceedings under the Co-operative Societies Act by Arbitration suit and then

by filing civil suit. *Prima facie*, it cannot be said that there was an exceptional case warranting interference of the Trial Court and grant of *ex parte* injunction of mandatory nature whereby contract of transportation work was required to be imposed against the Co-operative Society and that too in favour of 50 members though only 9 of them came to the Court. This also shows non-application of mind and not proper exercise of extra ordinary powers of interim injunction of mandatory nature in a suit based on contract.

Ordinarily, the relief of *ex parte* interlocutory mandatory injunction is granted to maintain or restore the status quo of the last non-contested status which preceded the pending controversy until the hearing or to compel the undoing of those acts that have been illegally done or restoration of that which was wrongfully taken from the aggrieved party. Mandatory injunction itself is exceptional. Interim mandatory injunction compelling the other party to continue the contract, breach whereof could be efficaciously compensated, cannot be said to be rarest of rare cases requiring interference of the Court without even giving an opportunity for hearing to the other side.

For the grant of mandatory injunctions, according to the settled proposition of law, following guidelines ought to be kept in mind:

- (1) The plaintiff has a strong case for trial, that is, it shall be of a higher standard than a *prima facie* case that is normally required for a prohibitory injunction.
- (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
- (3) The balance of convenience is in favour of the one seeking such relief.

No doubt, it being essentially an equitable relief, the grant or refusal of an interlocutory mandatory injunction must rest in the sound judicial discretion of the Court to be exercised sparingly and exceptionally in the light of the factual background and scenario in each case. The aforesaid principles for the grant of interlocutory mandatory injunction are not appreciated by the learned Trial Court Judge in the present case.

After putting into scale the rival versions and the

aforesaid factual scenario and the relevant proposition of law governing the grant of ad interim interlocutory injunction of mandatory nature, this Court has no hesitation in finding that this is a rarest of rare case wherein this Court is obliged to exercise its power by invoking the aids of the provisions of Order 43 Rule 1(r) of the Code and quash and set aside the impugned ex parte mandatory injunction.

Before parting, a caution is sounded that the Trial Court will have to decide Ex.5 uninfluenced by the observations made hereinbefore only on merits of the case in accordance with law. Until Ex.5 is decided on its merits, defendant Co-operative Society, the appellants herein, making any ad hoc arrangement for transportation will be subject to the outcome of Ex.5 in the suit.

It was really very painful to glance at the factual scenario and the impugned order recorded by the learned Trial Court Judge was so casual and lightly that it has shocked the conscience of this Court. It must be remembered and seriously noted by the members of the Sub-ordinate judiciary the cry raised by this Court and the Apex Court in various judicial pronouncements that the Court should be more careful and circumspect in passing interlocutory orders. The Court should be very slow in such case and should not resort and jump to exercise the power of granting extra-ordinary, ex parte equitable powers so lightly and casually. Time and again the courts have deprecated the practice of granting interim orders which practically give the principal relief prayed in the suit for no better reason than that a *prima facie* case has been made out without being concerned about the balance of convenience, public interest and many such other considerations. The Court ought to consider the settled propositions of law and the guidelines enumerated time and again in various pronouncements while passing interlocutory orders of injunction and that too of mandatory nature and ex parte. It is hoped that the members of the Sub-ordinate judiciary will seriously yield to the caution in future in such cases.

In the result, this appeal is allowed. The impugned order granting ex parte injunction of mandatory nature is vacated. There shall be no order as to costs.

The learned advocate appearing for the respondents original-plaintiffs, at this stage request for stay of the operation of this judgment and order and continuance of the ad interim mandatory injunction granted by the

Trial Court for a period of eight weeks. In view of the aforesaid facts and circumstances, this submission is meritless and is required to be rejected. Accordingly, it is rejected.

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